IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA **PLAINTIFFS**

v. **CASE NO.: 05-CV-00329 GKF –SAJ**

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC. **DEFENDANTS**

TYSON DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 26, 2007, OPINION AND ORDER

Plaintiffs filed a motion, styled as a "motion for reconsideration" (Dkt. No. 1074), in which they seek relief from the Honorable Sam A. Joyner's February 26, 2007 Opinion and Order. 2/26/07 Order (Dkt. No. 1063). More specifically, Plaintiffs' motion seeks to reargue matters which this Court decided against them in the February 26, 2007 Order. Plaintiffs have not established a factual or legal basis warranting modification of the February 26, 2007 Order. In fact, Plaintiffs simply repeat the arguments they made and lost in response to the Tyson Defendants' Motion to Compel. Thus, the motion is Plaintiffs' latest attempt to escape their discovery obligations under the Federal Rules and further, to delay and prejudice the Tyson Defendants' ability to prepare a defense. Plaintiffs' Motion for Reconsideration should be summarily denied by the Court.

I. PROCEDURAL BACKGROUND

The Tyson Defendants have been waiting more than ten (10) months for Plaintiffs properly to respond to interrogatories regarding the nature of their claims and the proof, if any, supporting their allegations. The interrogatories at issue were served on Plaintiffs on May 2, 2006. Plaintiffs responded, quite inadequately, on June 15, 2006. After numerous unheeded requests for supplementation of those interrogatory responses, the Tyson Defendants filed a Motion to Compel on January 11, 2007. *See* Motion to Compel (Dkt. No. 1019). Following a lengthy hearing on February 15, 2007, the Court granted the Tyson Defendants' Motion to Compel. 2/26/07 Order (Dkt. No. 1063).

In its Order, the Court overruled Plaintiffs' objections to the Tyson Defendants' interrogatories, found that Plaintiffs' June 15, 2006, responses were evasive, and ruled that Plaintiffs' method of making Rule 33(d) designations by box numbers on unverified indices was "insufficient." 2/26/07 Order, p. 7 (Dkt. No. 1053). With respect to Rule 33(d) designations, the Court instructed that "[a]bsent agreement by the parties to a preferred method, the Court will require Plaintiff to respond by listing responsive documents by Document Box and Bates numbers for each interrogatory." 2/26/07 Order, p. 8 (Dkt. No. 1053). The Court ordered Plaintiffs to supplement their responses to the interrogatories "within 30 days of the date of this order." 2/26/07 Order, p. 11 (Dkt. No. 1053).

On February 28, 2007, counsel for Plaintiffs and counsel for the Tyson Defendants discussed the issue of Rule 33(d) designations. During that conference call, Plaintiffs complained vociferously about the "Bates number standard" established by this Court's Order. Counsel for the Tyson Defendants explained that the Tyson Defendants wanted the specificity that a Bates number reference would provide but offered to discuss any alternative methods that Plaintiffs wanted to propose. Counsel for the Tyson Defendants also offered to review any individual interrogatories which Plaintiffs viewed as requiring expansive Rule 33(d) designations to see if there was an alternative method of making the designations that would be acceptable to the Tyson Defendants. Plaintiffs never proposed an alternative method of making Rule 33(d) designations nor did they accept the Tyson Defendants' invitation to discuss any concerns they had about the scope of Rule 33(d) designations regarding any particular interrogatories. Instead, they apparently prepared their Motion for Reconsideration.

Despite having reached no agreement with the Tyson Defendants (as provided in the Court's Order) and having obtained no relief from this Court, Plaintiffs made Rule 33(d) designations by an "alternative method" as part of the March 15, 2007, deposition of the records custodian for the Office of the Secretary of the Environment ("OSE"). At that deposition, noticed by defendant Cargill, Inc., Plaintiffs made available for inspection specific categories of documents. In a repeat of the debacle that led to the Tyson Defendants' Motion to Compel, Plaintiffs once again made informal and broad Rule 33(d) designations through an unverified index. Plaintiffs' willful refusal to comply with the Court's February 26, 2007 Order in connection with the documents produced at this deposition is shocking and sanctionable. Remarkably, the OSE records custodian testified that he was unaware of this Court's February 26, 2007 Order. Ex. A, Strong Depo. 65:20 – 66:2. He further testified that the OSE could have Bates numbered documents being identified under Rule 33(d) for the Tyson Defendants' interrogatories but they did not because he "did not know it was necessary." Ex. A, Strong Depo. 67:3-15.

Now, after having already willfully violated the February 26, 2007 Order, Plaintiffs ask this Court to "reconsider" its rulings. Plaintiffs ask this Court to withdraw the Bates number identification standard, to approve the wholly inadequate method of making Rule 33(d) designations this Court rightly rejected, to grant Plaintiffs additional time to submit similarly inadequate discovery responses, and to excuse their obligation to answer two, very important interrogatories. Plaintiffs are not entitled to any of the relief they seek, and the Motion for Reconsideration should be denied.

II. ARGUMENT

A. Motions for Reconsideration Are Not Recognized Under the Rules and Cannot be Used to Argue Matters that Could Have Been Presented Earlier

Plaintiffs have styled their motion as one for "reconsideration." Motions for reconsideration are not recognized under the Federal Rules. *See, e.g., Servants of the Paraclete v. Does*, 204 F.3d 1005,1012 (10th Cir. 2000); *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). Instead, a motion styled as one for reconsideration must be treated as a Rule 59(e) motion to alter or amend a judgment. *Van Skiver*, 952 F.2d at 1243. The standard for granting a Rule 59(e) motion is extraordinarily high. *See Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). It is "inappropriate [to use such motions] to reargue an issue previously addressed by the court . . . [or to] advance new arguments or supporting facts which were available at the time of the original motion." *Servants of the Paraclete,* 204 F.3d at 1012. "It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.* (citing *Van Skiver*, 952 F.2d at 1243).

All the "facts" and arguments advanced in the Motion for Reconsideration were available to Plaintiffs in response to the Motion to Compel. Plaintiffs act as though they just now realized that they choose not to Bates number documents on which they based their Rule 33(d) responses. Motion, pp. 1, 5. Clearly, Plaintiffs argued these same points in defending their document production and identification procedures in their response to the Motion to Compel (Dkt. No. 1036) and at the February 15, 2007, hearing. Tr. 2/15/07 Hrg. pp. 117-18, 122-27 (Dkt. No. 1073). Likewise, Plaintiffs' arguments about the breadth of Tyson Foods Interrogatory Nos. 3, 4 and 6 and Tyson Poultry Interrogatory No. 3 (Motion, pp. 5, 6, 12, 13) were available to Plaintiffs and could have been presented either in their papers or at the February 15, 2007 hearing.

Plaintiffs have refused for almost a year appropriately to respond to interrogatories seeking to discover the scope of their claims against the Tyson Defendants and the bases, if any, for those claims. In its February 26, 2007 Order, this Court resolved this longstanding discovery dispute. If every discovery order issued by this Court is going to be reargued in a motion to reconsider, this case will never progress and the prejudice to the defendants will be exacerbated. If Plaintiffs want relief from this Court's February 26, 2007 Order they must point to more than arguments already made and facts which were available to them at the time the Motion to Compel was argued and decided.

B. Rule 33(d) Designation by Bates Number is Both Possible and Reasonable

Plaintiffs' primary attack on the February 26, 2007 Order is directed at this Court's ruling that "absent an agreement by the parties to a preferred method, the Court will require Plaintiff to respond by listing responsive documents by Document Box and Bates numbers for each interrogatory." 2/26/07 Order, p. 8 (Dkt. No. 1063). Identifying documents by Bates numbers is hardly a novel or unprecedented approach to discovery in general, or a parties' Rule 33(d) obligations in particular. *See, e.g., In re Urethane Antitrust Litig.*, 2006 WL 1895456 at *4 (D. Kan., July 7, 2006) ("The Court therefore concludes that Plaintiffs' reference to various Bates-stamped documents was proper under Rule 33(d)."); *Eaton v. ZF Meritor, LLC*, 2006 WL 587833 at *1 (E.D. Mich., March 10, 2006) ("pursuant to Rule 33(d), Plaintiff shall specify by Bates number or otherwise, where the responsive documents will be found"); *In re G-I Holdings, Inc.*, 218 F.R.D. 428, 439 (D. N.J. 2003) (ordering defendants to "follow[] the guidelines outlined by Rule 33(d) by . . . designating responsive documents by Bates number.")

Plaintiffs clearly have the ability to Bates number documents as they have done so in connection with earlier document productions in this case. Indeed, the State's own agency representative testified that OSE could have Bates numbered its documents. The fact that Plaintiffs chose not to Bates number agency records that they now claim specifically answer interrogatories is curious, but hardly constitutes a basis for this Court to modify its February 26, 2007 Order. Nor does it justify providing Plaintiffs with the option of identifying documents in a less precise manner. Here, it is important for the Court to understand that its February 26, 2007 Order does not require Plaintiffs to go back and Bates number over 300 boxes of original agency records. The only documents which Plaintiffs are required to bates number under the Order are those specific documents which they are representing under oath actually contain the answer to an interrogatory served by the Tyson Defendants. As Plaintiffs have confessed several times now, the 300 boxes of agency documents included mountains of material that was allegedly responsive to Rule 34 document requests served by other defendants in this case. This Court's Order does not require Bates numbering of documents being produced for other defendants under Rule 34 requests for production.

As for documents identified under Rule 33(d) in connection with the Tyson Defendants' interrogatories, it should be the exception, rather than the rule, that Plaintiffs supplement their interrogatory responses to refer the Tyson Defendants to documents that contain those answers. Accordingly, the "burden" that Plaintiffs claim will materialize only if Plaintiffs continue the overly broad designation practices which this Court expressly rejected in its February 26, 2007 Order. The Bates number standard for Rule 33(d) designations should serve to deter further abuses by Plaintiffs. Consequently, the Tyson Defendants ask that this Court not alter its ruling that "absent an agreement by the parties to a preferred method, the Court will require Plaintiff to respond by listing responsive documents by Document Box and Bates numbers for each interrogatory." 2/26/07 Order, p. 8 (Dkt. No. 1063).

C. Plaintiffs' Proposed "Alternative Method" for Making Rule 33(d) Designations is Inadequate

At the OSE records custodian deposition, counsel for the Tyson Defendants had an opportunity to explore the claimed adequacy of Plaintiffs' "alternative method" of identifying "files" instead of just whole boxes of documents on an unverified index. Plaintiffs' "alternative method" is not an improvement from the box number indexing method rejected by the Court in its February 26, 2007 Order, and certainly does not provide the level of specificity that would be available through Bates number references. Specifically, Plaintiffs' "alternative method" does not identify particular documents. Each "file" consists of hundreds if not thousands of pages of documents. Each file contains various types of documents covering various subjects. Some of the documents in a file might be responsive to an interrogatory, but Plaintiffs still refuse to differentiate between those documents which contain answers to the Tyson Defendants' interrogatories and those that do not. The following testimony of the OSE records custodian at the February 15, 2007 deposition illustrates the utter inadequacy of Plaintiffs' "alternative method":

> Q. Okay. Let's look at entry number 6, for example, of box number 1, on the index it says under the column file/document name, it says fiscal year or FY 99 correspondence, correct?
>
> A. Correct.
>
> Q. Did you review that file?
>
> A. I don't recall.
>
> Q. Okay. So you couldn't tell me the size of it?
>
> A. No, I could not.
>
> Q. And you couldn't tell me what's in it?
>
> A. Only generally that it is most likely grant related correspondence.
>
> Q. For, I guess, a particular period of time?
>
> A. Fiscal year '99.
>
> Q. Okay. Would it relate to all grants in '99?
>
> A. I'm not sure.
>
> Q. Is that possible?
>
> A. Yes, it is possible.
>
> Q. I mean, do you guys normally file correspondence relating to grant just by year?
>
> A. That has been done, yes.
>
> Q. Okay. So there's a possibility there's things in that folder that may not relate to the Illinois River watershed; right?
>
> A. There's a possibility.

Ex. A, Strong Depo. 64:10 -65:12. Plaintiffs' own agency representative conceded that the State is forcing the Tyson Defendants to sift through a haystack of largely unresponsive documents in hopes of finding a needle that might be responsive. The only difference now is that the haystack is "files" instead of "boxes."

D. Plaintiffs Should Not Be Excused from Supplementing Their Responses to Tyson Foods Interrogatory Nos. 3 and 4

As part of the February 26, 2007 Order, the Court held Plaintiffs' responses to Tyson Foods Interrogatory Nos. 3 and 4, among other responses, evasive, incomplete and insufficient and ordered Plaintiffs to supplement their answers to those interrogatories. 2/26/07 Order, p. 10-11 (Dkt. No. 1063). These two interrogatories seek to discover properties owned by the State and the extent to which chemicals or the substances at issue in this case have been stored, applied or disposed of on those properties. Plaintiffs claim that "while <u>some</u> of this information may be relevant to the claims and defenses in this case, <u>all</u> of this information is certainly not relevant." Motion, p. 13 (Dkt. No. 1074) (emphasis in original). This response is not the proper forum in which to educate the Plaintiffs about the full ramifications that this evidence, once discovered, will have on their case.

It is sufficient at this point simply to explain that the evidence sought through these two interrogatories is relevant in at least two significant respects. First, Plaintiffs' standing to pursue sweeping "natural resource damage" claims for more than 1 million acres of property that is largely owned by private parties is an issue that this Court will have to decide. In fact, the Defendants have filed a Motion for Judgment on the Pleadings on this issue. *See* Defs. Motion for Judgment on the Pleadings Due to Lack of Standing (Dkt. No. 1076). Second, and perhaps more importantly, Plaintiffs' burden of proof and the availability of joint and several liability under their common law claims and CERCLA will turn on the question of whether the State also is a contributor to the harm alleged in this case. The Tyson Defendants suggest these are the reasons that Plaintiffs have asked the Court to excuse them from providing this evidence. They know this evidence is devastating to their case as a matter of law, and that is why they continue to try to conceal the facts sought in Tyson Foods Interrogatory Nos. 3 and 4. This Court was correct in ordering Plaintiffs to respond to these two interrogatories as part of the February 26, 2007 Order. Plaintiffs' motion seeking reconsideration of that ruling should be denied.

III. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of March 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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